

Parliament is Functioning without Opposition: Is it Parliamentary Democracy?

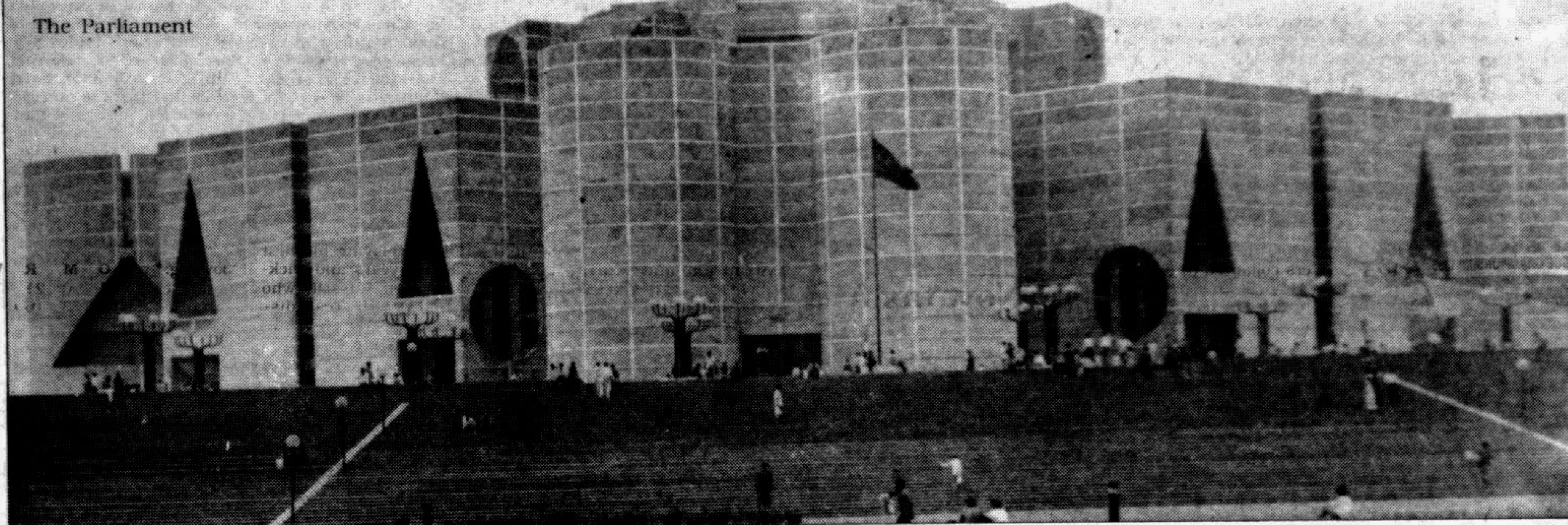
Continued from page 9

expediency, or the motive, political or otherwise, or bonafides of the President in making the Reference cannot be gone into. AIR 1974 (SC) 1682 and AIR 1979 (SC) 478.

I find myself to be completely unable to accept the reasons advanced by Dr. Kamal Hossain and Syed Ishtiaq Ahmed for returning the Reference. When the question of passing a resolution in Pakistan Parliament on recognition of Bangladesh came up as a Reference under Article 187 of the Interim Constitution of Pakistan, 1972 the Supreme Court knowing and noticing that recognition of a State is the exclusive privilege of the Executive answered the question vide PLD 1973 (SC) 563. In our Constitution it has never been recognised either by any judicial decision or by text book writers or jurists that the question of vacation of a seat of a member of parliament lies exclusively within the primary jurisdiction of Parliament. Rule 178 merely provides that if a member is absent without leave of Parliament for ninety consecutive sitting days, the Speaker shall bring the fact to the notice of the House, if it is in session and if not in session then immediately after the House reassembles. The question is, does Parliament or the Speaker ... exercise any power or jurisdiction either under the Constitution or the Rules of Procedure, when a seat of a member falls vacant?

In England continued leave of absence from either House does not appear to be a ground for vacation of seats. "In modern times," writes Sir Erskine May in Parliamentary Practice (Twenty-First Edition, 1989) "the ensuring of attendance in the Commons has become a principal function of the party machinery." (P 168). Further, in respect of the House of Commons, he writes, "In the absence of any specific orders to that effect, Members are presumed to be in attendance upon their service in Parliament ... It is not now considered necessary for a Member to be given leave of absence in the ordinary course of his business, but such leave has been frequently given to official delegations from the House ..." and to the Speaker. (P 169).

In some countries, like India (Article 101 (4)), Malaysia (Article 52), Pakistan Constitution, 1973 (Article 62) and in the Government of India Act, 1935 (Section 68), it is for Parliament itself to declare a seat of a member to be vacant for absence without leave of Parliament. In their cases, the plea of primary and exclusive jurisdiction is understandable, but our Constitution and that of Sri Lanka (Article 66), Nepal (Article 38) and Singapore (Article 46) do not confer upon Parliament the power of declaring vacancy in any seat. Our Article 67 (1) (b) is an automation clause, the role of the Secretary of Parliament being only to maintain a register of attendance of members (Rule 180 of the Rules of Procedure) and the role of the Speaker being limited to bringing the fact of vacancy to the notice of the House (Rule 178 (3) of the Rules, Rule 178 (4) is in following terms:



The Parliament

"178 (4). If the seat of a member becomes vacant, the Secretary shall cause a notification to that effect to be published. In the Gazette and forward a copy of the notification to the member concerned and also to the Election Commission for taking steps to fill the vacancy thus caused."

Parliament, therefore, has no constitutional power to declare the seats of absentee members to be vacant. The work that the Secretary to Parliament does under Rule 180 is ministerial in nature. The role of the Speaker under the Rule 178(3) is a communicating role and the role of the Secretary under Rule 178(4) is a formal one. No jurisdiction has been conferred upon Parliament to 'declare' a seat vacant under Article 67 (1) (b).

The calculating role, communicating role and the role of publication in official Gazette do not preclude the seizure of initiative of a member of the concerned member's constituency to invoke the jurisdiction of the Supreme Court if in fact a vacancy has taken place under the automation clause of Article 67(1) (b) and if the Speaker and his staff has failed or deferred to take the required action in the matter, because it is a matter relating to the composition and constitution of Parliament, which is not an "internal proceeding" of the House. If Parliament is in seisin of the matter, then of course the Court will restrain its hands, but if it is not in seisin of the matter, then I do not see why the President cannot refer an interpretation of some words in the Constitution relating to vacancy of seats for absence without leave for the advisory opinion of this Court and also why the Court will refrain from answering the same, when, under the Constitution, Parliament is not clothed with the power and jurisdiction of declaring a seat vacant under Article 67(1) (b).

In respect of Parliament, I know of no other principle of judicial self-restraint than the one that the Court will not interfere with the "internal proceedings" of Parliament. What is an "internal proceedings" of Parliament is also for this court to decide, if it requires a decision, and it is well-settled that these words cannot be fitted into a straight jacket of complete categorisation. The President has not asked us to answer any question that fairly concerns the "internal proceedings" of Parliament and its Speaker relating to its proper business. The questions do not pertain either to the regulation of the procedure of Parliament or the conduct of its business or the maintenance of order in the Assembly or affecting any of its privileges. The questions referred to us relate to an interpretation of certain words occurring in the Constitution and in so far as the interpretation of any word or words in the Constitution is concerned the Supreme Court is the final arbiter. Let there be no mistake about it. I would rather describe the role of this Court in such a situation of unparalleled nature not as a wrecker, but as a rescuer, not as an interloper but as a guide, not as a usurper but as a beacon light.

The exercise of advisory jurisdiction and the exercise of appellate jurisdiction are exercises of two different kinds and in a pending appeal, after the Reference is disposed of, the parties are free to re-agitate any question of law on which an opinion has been given in an advisory capacity, in the light of the facts of the cases themselves. Pendency of appeals can therefore be no ground for not returning an answer to the Reference. In so far as future litigations are concerned even the disposal of an appeal on a point of law may prejudice future litigants. An advisory opinion prejudices nobody, the possibility of non-acceptance is not a premise with which the Court will start the exercise of an advisory role. Rather the Court will presume that the honour done to this Court by soliciting an opinion on some questions of law will be complemented by its acceptance

not be honoured has never deterred any Court from answering a Reference. Also in a Reference, no one is strictly a party having a right to be heard and therefore we do not think that it will be inadvisable to answer the Reference without hearing the affected political parties (see PLD 1973 (SC) 563).

I am, therefore, firmly of opinion that there is neither any good reason nor any weighty reason of a compelling nature for not answering the Reference.

With regard to the first two questions I agree with Mr. Khandker Mahbubuddin Ahmed (and regretfully reject Syed Ishtiaq Ahmed's submission) that the questions asked is only one, not two — whether walk-out or boycott under the circumstances is "absent from Parliament without leave of Parliament" within the meaning of Article 67(1) (b) of the Constitution. Whether the absence has actually resulted in vacation of seats is not the question before us, or else question nos. 3 and 4 would not have been asked. I also agree with M/s. Syed Ishtiaq Ahmed, Khandker Mahbubuddin Ahmed and Rafique-ul-Huq that the end result of both walk-out and boycott is absence without leave of Parliament. Any information gap in the Reference as to when walk-out ended and boycott began is immaterial. It has been urged with varying emphasis by M/s S R Pal, Asrarul Hossain and T H Khan that a walk-out or boycott being in the nature of a mass-scale absence from Parliament as a measure of protest and/or with an element of force (in the case of boycott) the question of obtaining leave of the House does not arise and therefore this kind of absence is not contemplated in the Constitution. Mr T H Khan has additionally submitted that the Reference has been made in an unusual circumstance unparalleled in the annals of Parliamentary history anywhere in the world. The opposition members are not attending the sessions of Parliament for 16 months. Article 70 of the Constitution and Article 123 (4) of the Constitution are to be kept in mind while interpreting the word "absent", he submits. Also, he submits, it should be borne in mind that in interpreting a constitutional provision the intention of the framers of the Constitution should be kept in view and he has cited several authorities in support of his submission. He urges that a mass-scale absence from Parliament was never within the contemplation of the framers of the Constitution. The makers of the Constitution desired a working, continuing and functioning Parliament and not a Parliament from where half of the members absent themselves on the pretext of walk-out and boycott for an indefinite period. They should therefore in his submission be deemed to be present or else the Parliament is injured, depleted and curtailed and its credibility is shaken. In all written Constitutions the framers envisage the possibility of absence from the House, whatever be the reason, and puts and upper limit to the period of absence with a provision for bye-election to keep the democratic process in motion. Through the courtesy of Mr Rafique-ul-

Huq, learned Counsel, we have been apprised of the upper limits provided in some other Constitutions of the world and we find that our Constitution provides the longest possible latitude to the members of Parliament during which they can remain absent without leave. The term "absent" cannot receive different interpretations in different circumstances because that will introduce an element of uncertainty in the interpretation of a constitutional provision and will make the door open to provide for the longest longitude as well. If we hold that in the circumstances described in the statement of facts in the Reference there can be two kinds of absences, namely, (i) the kind mentioned in Article 67(1) (b) and (ii) the kind not contemplated in the said Article, then the concept of Supremacy of the Constitution suffers a serious jolt. We cannot give our stamp of approval to two kinds of parliamentary absence, one sanctioned by the Constitution and the other outside of the reach of the Constitution. It is precisely for this reason that we rejected the contention of the learned Attorney General in the case of Kudrat-e-Elahi Paner vs Bangladesh, 44 DLR (Ad) 319, that there can be two kinds of local governments, one within the meaning of Articles 59 and 60 of the Constitution and the other outside of those Articles. The Constitution in Article 67(1) (b) has allowed members of Parliament to remain absent for any reason whatsoever for eighty nine consecutive sitting days without the leave of Parliament and it really does not matter whether this period is consumed by an individual member or by some members en bloc by illness, absence from the country, walk-out or boycott. Eighty nine consecutive sitting days of absence is the permissible limit upto which the leave of Parliament is not necessary for any kind of parliamentary or unparliamentary behaviour. But once this permissible limit is crossed, the guideline will apply and the member "shall vacate his seat". Article 70 and article 123 (4) will be a consideration of consequence of a fortuitous nature, a consequence which may or may not be present on all occasions, but a constitutional provision cannot be interpreted in consideration of consequences of a fortuitous character.

With regard to question nos. 3 and 4, the matter has been exhaustively dealt with by the learned Chief Justice and I have no further observations to make, but in concluding I must put on record the tremendous labour, industry, sincerity and seriousness with which all the learned Counsels with their able juniors have assisted us in the matter, keeping their submissions outside of political debate and providing legal and constitutional flesh to the skeleton of the Reference.

Latifur Rahman, J — I fully agree with the opinion of my Lord, the Chief Justice.

This reference has been made by the President of the People's Republic of Bangladesh under Article 106 of the Constitution of Bangladesh for the opinion of this Division on four questions of law and considerable public importance that have arisen out of walkout, boycott and consequent absent of all the members of the opposition parties from the Parliament. This is the first Reference before the Appellate Division under the present Constitution. The four questions referred are as below:

(1) Can the walkout and the consequent period of non-return by all the opposition parties taking exception to a remark of a ruling party minister be construed as 'absent' from Parliament without leave of Parliament occurring in Article 67(1) (b) of the Constitution resulting in vacation of their seats in Parliament?

(2) Does boycott of the Parliament by all members of the opposition parties mean 'absent' from the Parliament without leave of Parliament within the meaning of Article 67 (1) (b) of the Constitution resulting in vacation of their

seats in Parliament? (3) Whether ninety consecutive sitting days be computed excluding or including the period between two sessions intervened by prorogation of the Parliament within the meaning of Article 67 (1) (b) read with the definition of 'Sessions' and 'Sittings' defined under Article 152 (1) of the Constitution?

(4) Whether the Speaker of Parliament will compute and determine the period of absence? The relevant and material background facts of this reference may be stated as follows:

On 1st of March, 1994 while there was a discussion in Parliament on call attention notice on the killings in Hebron, there was uproar on the statement made by the then Information Minister in the House. The Deputy Leader of the House requested the Deputy Speaker to expunge the relevant part of the statement from the proceedings of the House and the Information Minister himself expressed his regret and also sought for expunction of the remark. All opposition members of the Parliament including the Leader of the Opposition except Mr. Suranjit Sen Gupta staged a walkout. The Deputy Speaker announced expunction of the statement to which opposition parties have taken exception but the opposition members did not return to the House. They also did not join the House on the following day and demanded that unless the Information Minister had tendered unqualified apology they would not return to Parliament. While the opposition members were acting as such, the bye-election of Magura constituency was held and the opposition parties made certain allegations to the Election Commission and the Election Commission after enquiry having found that the allegations were not true declared the final result, whereupon the opposition parties declared that unless fresh election was held in Magura after cancelling the result declared by the Election Commission, they would not return to Parliament. While negotiation between the parties were going on for resolving the problem, the opposition parties added a new demand, namely, the ruling party must introduce a bill in Parliament amending the Constitution to provide for holding at least three future Parliamentary elections under care taker government. To compel the ruling party to concede to the above demand the opposition parties started boycotting the sessions of Parliament. The opposition parties continued boycott of the Sessions of the Parliament and on 28.12.94 the Leaders of three opposition parties, namely, the Awami League, the Jatiya Party and the Jamaat-e-Islami handed over three files purportedly containing resignation letters of members belonging to their parties to the Speaker. The Speaker found that all the resignation letters were on the identical ground, namely, the failure of the ruling party to introduce a bill in the Parliament for amending the Constitution to provide for holding general election to Government under a neutral, non-partisan government

compromising nominated person. The Speaker on 23rd February, 1995 informed the House that in his view en masse resignation on such ground is not contemplated under Article 67 (2) of the Constitution. According to the Speaker the Constitution cannot contain any provision which will enable a member or members to frustrate the working of the Parliament and further that all the provisions of the Constitution required working in a manner to achieve the objectives following the principle of democracy as set forth in Constitution. In the letter of reference, dates of commencement of the sitting days of the Sessions of the Parliament and their date of prorogation have been given from where it appears that the total number of boycott days are 101.

As a result of the said boycott question has arisen whether this boycott is "absent" from Parliament and what should be the basis of computing 90 consecutive sitting days occurring in Article 67(1)(b) of the Constitution. Consequently, the above four questions have been formulated by the President.

I will try to dispose of the four questions on a narrow compass without being very pedantic and verbose and without also burdening my opinion with various citations from different jurisdictions cited by the amicus curiae (friend of court). I honestly feel that the four questions are simple to answer.

It has been argued by some of the learned advocates from the Bar that there being certain factual gaps in the reference, this court should respectfully refuse to answer the reference. By reading the reference I do not find any difficulty in answering the reference. The reference being made by the President and this being the factual basis of all relevant facts, this court has got no power to add or subtract anything in it. From the Bar a large number of authorities have been cited with reference to the Advisory jurisdiction of the Governor General of India under the Government of India Act, 1935, Advisory jurisdiction of the President of India and Pakistan under their Constitutions. From the decisions referred from 1939 to 1995, I find that most of the references were answered.

There has been also another argument by some of the learned advocates that the questions referred are political in nature within the floor of the House and outside the House which this court would refuse to answer. I do not think that the four questions formulated by the President are really questions of political nature. A demand by all the political parties must have a political colour as they believe in some political opinion, but for that reason alone a question cannot be refused to be answered by saying that it is a political question. It is indeed a political demand of all the opposition parties to hold general election. Parliament under a neutral, non-partisan care-taker Government and on this demand they are remaining outside the Parliament. The demand is motivated by political consideration, but the President wants to know the meaning of 'absent' with reference to Article 67(1)(b) of the Constitution.

Mr Syed Ishtiaq Ahmed submitted that the Speaker having not exercised the power under Rule 178 of the Rules of Procedure of the Parliament framed under the Constitution the reference made by the President under Article 106 of the Constitution should not be answered.

It may be stated here that, whether "walkout" or "boycott" will be 'absent' within the meaning of Article 67(1)(b) is not before the Speaker nor the Speaker is faced with such a problem in the Parliament. It is needless to say that under Article 78 of the Constitution of the Parliament and its members have got privileges and immunities as mentioned therein, which reads as follows:— "78(1). The validity of the proceeding in Parliament shall not questioned in any court".

the Parliament is beyond the purview of the Constitutional Court, but while acting in the name of internal proceeding, if any violation of Constitutional provision takes place then this court is certainly competent to interfere.

To understand the argument of Mr Syed Ishtiaq Ahmed it will be necessary to discuss a little about the scheme of our Constitution in respect of the three organs of the State. Our Constitution makes broad distribution of powers in the three organs of Government, the executive, the legislature and the judiciary. Though the Constitution brought distribution of powers, it does not envisage separation of power in its rigid form. In our Constitutional scheme, Parliament is vested with the legislative power of the Republic. But Parliament's legislative power is subject to the provisions of the Constitution. The Supreme Court being the apex court has been given the power of judicial review to see that the Parliament does not over step the limits set up by the Constitution. The judiciary as an organ of the State is another coordinated and co-equal organ with the executive and the legislature to see that the other two organs of the Government do not transgress the limits of Constitutional bounds. Constitution being the supreme law of the land, every organ under the Constitution must act within the limits and bounds of the Constitution. The Supreme Court is a creature of the Constitution and we the judges have taken the solemn oath under the Constitution to preserve, protect and defend the Constitution and the laws of Bangladesh. It is our solemn duty to see that the other two organs of the State do not act in violation of the Constitution. The Parliament being vested with the legislative power of the Republic can only make laws which are not inconsistent with the fundamental rights as guaranteed under the Constitution and any law made in violation of the Constitution shall be declared as void to the extent of the inconsistency. Thus, the Parliament in the name of making legislation cannot infringe the Constitution at all. Similar is the case of the executive, who is to act within the four corner of the Constitution and the laws, the actions of these two organs of the Government, namely, the Parliament and the executive are to be watched by the Supreme Court as the guardian of the Constitution. In performing this function, this court must also restrain itself and cannot do anything not permitted by the Constitution and laws, as if, every organ is in chains. So it does not stand to reason that this court having possessed the Advisory jurisdiction and being asked by the President to discharge the constitutional obligation would decline to exercise the same on mere assumption that exercise of such jurisdiction would encroach upon the functioning of the parliament. I do not think that here is any scope of conflict with the parliament if the reference is answered. Hence, Mr Syed Ishtiaq Ahmed's submission that till parliament exercises its primary exclusive jurisdiction the reference need not be answered is difficult to accept.

The precise questions in, question Nos 1 and 2 are, whether "walkout" and "boycott" respectively construe as "absent" from Parliament without leave of Parliament within the meaning of Article 67(1)(b) of the Constitution. This is precisely a matter of interpretation and a question of law which the President can very well ask under Article 106 of the Constitution and this court cannot refuse to exercise this Advisory Jurisdiction, unless it can be shown that there are good, valid and compelling reasons not to exercise the same. So the reference should be answered and I propose to answer the questions.

From the Bar a research has been made to find out the dictionary meaning of 'walkout', 'boycott' and 'absent'. I like to give these simple words its ordinary and natural meaning. Terms like 'Walkout' and 'Boycott' have not been noted in our Constitution. In our Constitution the word 'absent' is used.

In Article 67(1)(b), we find the word 'absent' which means simply not present. Whatever may be the meaning of walkout and boycott, the net result is that all the members of the opposition parties in the Parliament are absent.

The third question is whether 90 consecutive sitting days be computed excluding or including the period between two Sessions intervened by prorogation of the Parliament within the meaning of Article 67(1)(b) read with the definition of 'Session' and 'sitting' defined under Article 152(1) of the Constitution.

In these three above questions, Article 67(1)(b) of the Constitution have been referred, Article 67(1)(b) of our Constitution reads as follows:—

"67(1) A member of Parliament shall vacate his seat (b) if he is absent from Parliament, without the leave of Parliament, for ninety consecutive sitting days," The Bengali version reads as follows:—

"৬৭ (১) কোন সংসদ সদস্যের আসন শূন্য হইবে, যদি (ক) সংসদের অনুমতি না লইয়া তিনি এককিছুমতে নব্বই ক্রমিক-নব্বই অনুমতি থাকেন।"

The third question is also one of computation of 90 consecutive sitting days by excluding or including the period between two sessions intervened by prorogation of the Parliament. (The underlinings are mine for emphasis). This question is simply and clearly a question as to whether the "period between sessions intervened by prorogation of Parliament" is to be excluded for calculating "90 consecutive sitting days".

In Article 67(1)(b) we are concerned with sitting days. In Article 152 of our Constitution "sitting" in relation to Parliament, means a period during which the parliament is sitting continuously without adjournment. So there may be one sitting or more sittings in a day intervened by adjournments for various reasons. There is no "sitting day" during the period of prorogation of the parliament, hence ninety consecutive sitting days must be excluded between the period of two sessions intervened by prorogation of the parliament.

Article 67 of the Constitution relates to vacation of seats of members. The Speaker of the Parliament has been given the authority to follow up all relevant actions regarding resignation, vacation of seats and leave of absence of members in Parliament by various of Rules 178 and 179 of the Rules of Procedure of Parliament framed under Article 75(1)(a) of the Constitution.

For the foregoing reasons, my answers on the questions formulated by the President are as follows:

(1) Question Nos. 1-2 "Yes".

(2) Question No 3 — 90 consecutive sitting days must be computed excluding the period between two sessions intervened by the prorogation of the Parliament.

(3) Question No 4 — The Speaker will compute and determine the period of absence.

It is very unfortunate that a situation has arisen in the country where after holding a free and fair general election on 27th February, 1991 under the Government headed by the Acting President, Mr Justice Shahabuddin Ahmed who was the then Chief Justice, the Parliament is functioning without all the opposition members. Is it Parliamentary democracy? We are all interested in building a better country for us and for our children. Are we not forgetting the true spirit of democracy? Democracy needs election. But election does not ensure democracy. Political democracy would never work unless we develop democracy in our culture. I only hope and expect that all the political parties of Bangladesh will cultivate respect and tolerance for each other to make our society a truly democratic society.

Before I part with the reference, I must put on record my great appreciation for the able assistance rendered by M/S S R Pal, Asrarul Hossain, Syed Ishtiaq Ahmed, Dr Kamal Hossain, Khandker Mahbubuddin Ahmed and Rafiqul Huq, who by their erudition and hard labour have thrown lights on different legal aspects on the Advisory Jurisdiction of this Division. It is indeed their love's labour for this great institution. I am sure this labour will not go in vain.

MUHAMMAD ABDUR ROUF, J : I hold the same opinion in respect of all the four questions expressed by the learned Chief Justice.

MOHAMMAD ISMAILUDDIN SARKER, J : I am in complete agreement with the opinion rendered by the learned Chief Justice and I have nothing more to add.

the Parliament is beyond the purview of the Constitutional Court, but while acting in the name of internal proceeding, if any violation of Constitutional provision takes place then this court is certainly competent to interfere.